457.

SUPREME COURT OF THE U. STATES.

No. 88.

BARNETT AND ELIZA LEVY, PLAINTIFFS IN ERROR,

vs.

EDMUND AND DAVID FITZPATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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UNITED STATES CIRCUIT COURT,
Ninth Circuit, Eastern District of Louisiana.

EDMUND FITZPATRICK and DAVID FITZPATRICK
vs.
BARNETT LEVY and ELIZA LEVY. } No. 404.

Be it remembered, that on the twelfth day of February, A. D. one thousand eight hundred and forty, Edmund Fitzpatrick and David Fitzpatrick, by their attorney, Stockton, Esq., came into court, and filed the following petition, to wit:

To the honorable the judges of the ninth judicial circuit court of the United States, holding sessions of said court at the city of New Orleans, in and for the eastern district of Louisiana, the petition of Edmund Fitzpatrick and David Fitzpatrick, who are citizens of the State of Virginia, resident of the county of Charlotte, in said State, most respectfully shows:

That Barnett Levy and Eliza Levy, who are citizens of the State of Louisiana, and resident of the parish of Madison, in said State, and within the eastern district of Louisiana, are indebted, in solido, to your petitioners, in the sum of twelve thousand and one hundred dollars, with interest thereon, at the rate of ten per cent. per annum, from the second day of February, in the year of our Lord one thousand eight hundred and thirty-eight, until final payment of the same shall be made, for this, to wit: on the twenty-sixth day of March, in the said year, eighteen hundred and thirty-eight, the said Barnett Levy, Eliza Levy, and one Moses A. Levy, (the said Moses A. Levy being at this time resident in the State of Mississippi, out of the jurisdiction of this court,) made their certain writing obligatory, the said Moses A. Levy signing and subscribing his name thereto by the name and signature of M. A. Levy; the said Barnett Levy signing and subscribing his name thereto by the name and signature of Barnett Levy; and the said Eliza Levy signing and subscribing her name thereto by the name and signature of Eliza Levy. The said obligation being sealed with the seals of the said obligors respectively, and by the said writing obligatory, the said Moses A. Levy, the said Barnett Levy, and the said Eliza Levy, bound themselves, and each of them, in solido, to pay the said Edmund Fitzpatrick or David Fitzpatrick, or their order, the said sum of twelve thousand and one hundred dollars, on the second day of February, 1839, with interest thereon at the rate of ten per cent. per annum, from the second day of February in the said year, eighteen hundred and thirty-eight, until final payment of the same, for value received, negotiable and payable at the residence of the said Barnett Levy, in the said State of Louisiana; all of which will more fully appear by reference to the

said writing obligatory, which is hereto annexed, and prayed to be taken as a part of this petition. By reason of all which, your petitioners allege the said Moses A. Levy, the said Barnett Levy, and the said Eliza Levy, became bound and liable, in solido, to pay to your petitioners the said sum of twelve thousand and one hundred dollars, with interest thereon as herein above set forth.

Your petitioners show further, that when said sum of money became due and demandable, demand of payment thereof was duly made at the residence of the said Barnett Levy, in the said State of Louisiana, and amicable demand has often been made of said sum of money, but the said obligors have hitherto wholly failed and refused to pay to your petitioners, or to either of them, the said sum of money, or any part thereof.

Your petitioners show further, that on the twenty-seventh day of March, in the said year eighteen hundred and thirty-eight, the more effectually to secure to your petitioners the payment of the said sum of money in said writing obligatory mentioned, the said Moses A. Levy, by and through the agency of Barnett Levy, his attorney in fact, who signed the name of his principal by the name and signature of M. A. Levy; the said Barnett Levy, and the said Eliza Levy, by a public act of hypothecation and mortgage, did specially hypothecate and mortgage to your petitioners the tract of land on which the said Eliza Levy and the said Barnett Levy then resided, and on which said land they still reside, containing five hundred and three acres, the same being section ten, in township fifteen, range fifteen east, in the district of lands north of Red river, it being the same land acquired by the said obligors from Alfred C. Downs, by act of sale before D. F. Conn, justice of the peace of Warren county, State of Mississippi, acknowledged on the twenty-third day of February, in the year eighteen hundred and thirty-five, and duly recorded in the office of the parish judge of the said parish of Madison, in the State of Louisiana; and also the following named slaves, to wit: Aaron, Burrell, Charles, Joe, Anderson, Darcos, Malindy, Judy, and Sarah, her daughter, Prince, Winny, Claracy, Sally, and Tildy.

Your petitioners allege further, that said act of hypothecation and mortgage imports a confession of judgment, and entitles your petitioners to the executory process; all of which will more fully appear by reference to an authentic copy of said act of hypothecation and mortgage, which is hereto annexed, and prayed to be taken as a part of this petition.

Your petitioners allege also, that although by the terms of the said act of hypothecation and mortgage, it was stipulated that said sum of money was to be paid by instalments, yet it was also stipulated in the said act, that if punctual payment was not made of any instalment when due, that your petitioners should have the right to enforce the immediate payment of the whole sum of twelve thousand and one hundred dollars, with interest as aforesaid. And your petitioners allege that default having been made as to the first instalment, which fell due and became demandable on the second day of February of

the current year, to wit, 1839, they are now entitled to the executory process for enforcement of the immediate payment of the whole sum of twelve thousand and one hundred dollars, with interest as aforesaid.

In consideration of all the premises, your petitioners pray that executory process may issue in the premises; and, after due proceedings had, that the said tract of land, and the negroes herein above mentioned as specially mortgaged to your petitioners, may be seized and sold to pay to your petitioners the said sum of twelve thousand and one hundred dollars, with interest thereon at the rate of ten per cent. per annum, from the second day of February, in the said year eighteen hundred and thirty-eight, until final payment of the same, and all costs of this proceeding.

Your petitioners pray for all such general and further relief as the nature and justice of their case will allow, and, as in duty, &c.

(Signed) STOCKTON,
Counsel and attorney for Petitioners.

Writing Obligatory.

$12,000. On or before the second day of February next, we, and each of us, bind ourselves, our heirs, &c., jointly and severally, in solido, to Edmund Fitzpatrick or David Fitzpatrick, or their order, the just and full sum of twelve thousand and one hundred dollars, with ten per cent. interest per annum, from the second day of February, eighteen hundred and thirty-eight, until final payment, for value received, negotiable and payable at the present residence of Barnett Levy, in the State of Louisiana; as witness our hands and seals, jointly, this 26th (twenty-sixth) day of March, eighteen hundred and thirty-eight.

(Signed) M. A. LEVY, [SEAL.]
(Signed) BARNETT LEVY, [SEAL.]
(Signed) ELIZA LEVY. [SEAL.]

No varietur.
March 27th, 1838.
(Signed) RICHARD CHARLES DOWNS,
Parish Judge, Parish of Madison, Louisiana.

Petition endorsed as follows:

Filed February 12th, 1839.
(Signed) HOIT, *Deputy Clk.*

Let an order issue as prayed for.
(Signed) P. K. LAWRENCE,
U. S. Judge.

Act of Mortgage annexed to Petition.

STATE OF LOUISIANA, *Parish of Madison:*

Be it known, that, on this twenty-seventh day of March, eighteen hundred and thirty-eight, before me, Richard Charles Downs, parish

judge and ex-officio notary public in and for the parish of Madison, State of Louisiana, aforesaid, duly commissioned and sworn, personally came and appeared Mrs. Eliza Levy, widow, residing in this parish, and Mr. Barnett Levy, her son, also residing in this parish, herein acting for herself and for Mr. Moses A. Levy residing in the State of Mississippi, by virtue of a power of attorney executed in the State of Mississippi, and duly proved before the undersigned judge, which said power of attorney is hereunto annexed for reference. And the said parties declared and said, that whereas they have made their joint and several obligation, in solido, for the sum of twelve thousand one hundred dollars, ($12,100,) payable on or before the second day of February next succeeding the date of this act, to Edmund Fitzpatrick or David Fitzpatrick, or their order, with ten per cent. interest: Now, in order to secure the payment of the said obligation or note, the said parties appearing do hereby specially mortgage and hypothecate, in favor of the said Edmund Fitzpatrick and David Fitzpatrick, and their heirs and assigns, the said Mrs. Eliza Levy herein acting for herself, and Barnett Levy herein acting for himself and for Moses A. Levy, as aforesaid, all that parcel of land situate in the parish of Madison, State of Louisiana, described as follows, to wit: section ten, township fifteen, range fifteen east, containing five hundred and three acres, as per original survey, more or less; which land was acquired by the present mortgagees by purchase from Alfred C. Downs by an act of sale, acknowledged before D. F. Cowan, a justice of the peace of Warren county, State of Mississippi, on the 23d day of February, 1835; which said act is duly recorded in the parish judge's office of this parish: Which lands are now the plantation on which the said Mrs. Eliza Levy and Barnett Levy reside, together with all the buildings and improvements thereon, and the following slaves occupied at labor on the said lands, to wit: Aaron, Burrell, Charles, Joe, Anderson, Darcus, Malindy, Judy, and Sarah, her daughter, Prince, Winney, Claracy, Sally, and Tildy: And the said mortgagees hereby bind themselves, and their heirs and assigns, not to remove, nor suffer to be removed from the said plantation, any of the above named slaves; and the said mortgagees further declared, that they hereby obligate themselves to pay one-third of the said note for twelve thousand one hundred dollars on its maturity, with interest, and one-third on the second day of February, eighteen hundred and forty, with interest, and the balance on the second of February, eighteen hundred and forty-one, with interest; and that they make this special mortgage to secure the payment of the said note only in this manner, and in no other; and that, on their failing to pay the said note in the three several instalments, as aforesaid, or any one thereof at its maturity, they hereby empower and authorize the said Edmund Fitzpatrick and David Fitzpatrick, or either of them, to avail themselves of all the advantages of this special mortgage, and to proceed to seizure and sale of the said lands and slaves hereby mortgaged, by executory process, according to law, for the whole sum of twelve thousand one hundred dollars. And to these presents also personally

appeared Mr. Edmund Fitzpatrick and David Fitzpatrick, the persons in whose favor this act is made, who said and declared that they do hereby accept this mortgage, and that on the faithful and punctual payment of the said note in three instalments, as aforesaid, they, and each of them, hereby renounce all right of action against the said mortgagees, other than is hereby granted by virtue of this special mortgage.

And the said note for twelve thousand one hundred dollars, intended to be secured by this act, is marked "Nevairetur" by the undersigned judge at the time of passing this act, in order to identify it with these presents. And the said Edmund Fitzpatrick and David Fitzpatrick further declared, that they do hereby dispense with the production of a certificate from the office of the recorder of mortgages of this parish; and do further release the undersigned judge from all liability, and hereby renounce any right of action they may have against him for want of the said certificate.

Thus done and passed on the day and date first above written, in presence of Zachariah H. Rawlings and Richard C. Stockton, witnesses, who have signed with the parties appearing, and the undersigned judge, after reading the whole.

(Signed) ELIZA LEVY,
BARNETT LEVY,
M. A. LEVY, per
BARNETT LEVY,
EDMUND FITZPATRICK,
DAVID FITZPATRICK,
RICHARD C. STOCKTON,
ZACH. H. RAWLINGS,
RICHD. CHS. DOWNES,
Parish Judge.

STATE OF LOUISIANA, *Parish of Madison:*

I do hereby certify the foregoing to be a true copy of the original act extant in my office, according to the laws and usages of the State.

In faith whereof I grant these presents, under my signature and official seal, this seventh day of April, eighteen hundred and thirty-eight.

(Signed) RICHARD CHARLES DOWNES,
Parish Judge.

UNITED STATES OF AMERICA, *State of Louisiana:*

By Edward D. White, Governor of the State of Louisiana:

These are to certify that Richard C. Downes, whose name is subscribed to the instrument of writing herein annexed, is, and was at the time of signing the same, parish judge of the parish of Madison, and that full faith and credit are due to all his acts as such.

Given at New Orleans, under my hand and the seal of the State, this 25th day of May, one thousand eight hundred and thirty-eight, and of the independence of the United States the sixty-second.

(Signed) E. D. WHITE.

By the Governor:

(Signed) W. C. C. CLAIBORNE,
Secretary of State.

Tuesday, February 12th, 1839.

The court met pursuant to adjournment. Present—Hon. P. K. Lawrence, District Judge.

E. & D. FITZPATRICK,
vs.
B. & E. LEVY. } No. 404.

On motion of B. Peyton, Esq., of counsel for plaintiffs, ordered, that he have leave to file a supplemental petition.

Supplemental Petition.

EDMUND FITZPATRICK & DAVID FITZPATRICK,
vs.
BARNETT LEVY & ELIZA LEVY.

To the honorable the Judges of the Circuit Court of the ninth judicial circuit, in and for the eastern district of the State of Louisiana:

The supplemental petition of Edmund Fitzpatrick and David Fitzpatrick, citizens of the State of Virginia, and who reside in the county of Charlotte in said State, to the petition formerly filed in this honorable court, the leave of the court for the filing of the same being first had and obtained for the filing of the same, respectfully shews: That petitioners have reason to apprehend that the defendants in this case will remove the following slaves, to wit: Aaron, Burrell, Charles, Joe, Anderson, Dorcas, Malindy, Judy, and Sarah, her daughter, Prince, Winney, Claracy, Sally, and Tildy, mentioned in the original petition, on whom your petitioners have a mortgage, importing a confession of judgment, as will more fully appear from the original petition to which this is a supplement, out of the jurisdiction of this honorable court, and out of the State of Louisiana, before the order of seizure and sale prayed for in the petition to which this is a supplement can be executed, and before petitioner's can have the benefit of the aforesaid mortgage, as two of the said negroes have been removed out of the State of Louisiana, to wit, to the State of Mississippi; and petitioners have been informed and believe that a third slave has also been removed out of this State. Wherefore pe-

titioners pray, that in consideration of the premises, and of the mortgage annexed to the original petition, and of the premises set forth in the original petition to which this is a supplement, and of the affidavit hereto annexed, that a writ of provisional seizure may be granted by this honorable court, directing the marshal to seize, take possession of, and retain said negroes according to law; and that the marshal be directed to seize and sell the negroes and land mortgaged to petitioners, as prayed for in the original petition, and that your petitioners be paid by preference and privilege the sum of money prayed for in the petition to which this is a supplement, and for all further and general relief which the nature of the case may require.

(Signed) STOCKTON,
PEYTON, and
THOMAS N. PIERCE,
Attorneys for Plaintiffs.

Know all men by these presents, that we, Edmund Fitzpatrick and David Fitzpatrick, of the county of Charlotte, and State of Virginia, for divers good causes and considerations us hereunto moving, have made, ordained, authorized, nominated, and appointed, and by these presents do make, ordain, authorize, nominate, and appoint John E. Fitzpatrick, also of said county and State, our true and lawful attorney, for us, and in our names, and for our own proper use and benefit, to ask, demand, sue for, recover, and receive of and from Barnett Levy and Eliza Levy, both of the parish of Madison, and State of Louisiana, all such sum or sums of money, debts, and demands whatsoever, which are now due and owing unto us the said Edmund and David, by and from the said Barnett Levy and Eliza Levy, and to have, use, and take all lawful ways and means in our names, or otherwise, for the recovery thereof, by attachment, executory process, or otherwise, and to compound and agree for the same: And acquittances, or other sufficient discharges for the same, for us, and in our names to execute, and to do all other acts and things whatsoever concerning the premises, as fully and in every respect as we ourselves might or could do were we personally present at the doing thereof; and especially do we authorize him to do all proper acts and things necessary for the prosecution of a suit which we are about to institute in the Federal court held in the city of New Orleans, hereby ratifying and confirming, and by these presents allowing whatsoever our said attorney shall, in our names, lawfully do or cause to be done in and about the premises by virtue of these presents.

In witness whereof, we have hereunto set our hands and seals this sixth day of February, in the year of our Lord eighteen hundred and thirty-nine.

(Signed) EDMUND FITZPATRICK. [SEAL.]
DAVID FITZPATRICK. [SEAL.]

The words "both of the parish of Madison, and State of Louisi ana," interlined before signed.

[REC. LXXXVIII.—]2

EDMUND FITZPATRICK and DAVID FITZPATRICK,
vs.
BARNETT LEVY and ELIZA LEVY.

John E. Fitzpatrick being duly sworn, makes affidavit and says, that he is the agent or attorney in fact of Edmund Fitzpatrick and David Fitzpatrick, the plaintiffs in the above entitled cause; that he apprehends that the slaves mentioned in said original and supplemental petitions will be removed out of the State of Louisiana before the plaintiffs can have the benefit of their mortgage; that the facts which induce his apprehension, as aforesaid, are these: that two of the said slaves have been removed out of the State of Louisiana since the granting of the mortgage, which is set forth in the original petition; and this affiant has been informed and believe, that another of said mortgaged slaves has been removed, or attempted to be removed out of the State of Louisiana. All which this affiant has reason to believe was done by and with the advice and connivance of the defendants in this case.

(Signed) JOHN E. FITZPATRICK.

Sworn to, and acknowledged before me, New Orleans, February 12th, 1839.

(Signed) HOIT, *Dep. Clk.*

Supplemental petition endorsed on the back.

Be it so. (Signed)
P. K. LAWRENCE,
U. S. Judge.

Filed, on leave, in open court, this 12th February, 1839.
(Signed) JNO. WINTHROP, *Clk.*

Petition for a Writ of Error.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit Court for the Eastern Dist. of Louisiana:

To the honorable the judge of the ninth judicial circuit court of the United States, holding sessions for said court at New Orleans, in and for the eastern district of Louisiana, the joint petition of Barnett Levy and Eliza Levy, citizens of said State of Louisiana, respectfully represents unto your honor:

That, on the 12th day of February, A. D. 1839, your honor rendered a definitive judgment of seizure and sale against your petitioners, in solido, for the sum of twelve thousand and one hundred dollars, with interest and cost, in favor of Edmund Fitzpatrick and David Fitzpatrick. Your petitioners aver, that in said definitive judgment there are various and manifest errors, whereby they must suffer irre-

parable injury, unless relieved by suspensive appeal; wherefore they pray to be allowed to appeal, and that your honor will grant such order of suspensive appeal in the nature of a writ of error, returnable into the Supreme Court of the United States at the city of Washington, in the District of Columbia, on the first day of the next term of said court, upon their giving security and complying with the requisitions of the law in such case made and provided. And your petitioners assign the following errors of law apparent upon the face of the papers:

1st. No oath or affidavit has been made by the creditors, or either of them, that the debt is due upon which the order of seizure and sale has been obtained. See Civil Code of Louisiana, *art.* 3,361.

2d. The power of attorney, if any exists, of Moses A. Levy, one of the defendants, is not attached to the papers nor filed in this suit, and there is no authentic evidence of it; there is a mere recital of it in the act.

3d. The certified copy of the act of mortgage is not completed, in as much as a certified copy of said power of attorney does not accompany it, though said act declares that said power of attorney was attached to it, and is of course an important part of the record.

4th. Though the written obligation may be joint and several, yet the act of mortgage is only joint, and it is indivisible; therefore it is illegal to proceed by executory process against any one or two of the joint obligors, to the exclusion of the other one or two.

5th. The proceedings generally are irregular and illegal, and can not be sustained; wherefore the judgment being erroneous, should be reversed, and the plaintiffs condemned to pay costs.

(Signed)

TENNY, DUNLAP & BRISCOE,
Attorneys for petitioners and appellants.

Petition of Appeal.

(Endorsed on the back, as follows:)

Let a writ of error issue, returnable at the next August term of the Supreme Court, the plaintiff in error giving security in the sum of twenty-five hundred dollars to operate as a supersedeas.

(Signed) P. K. LAWRENCE,
U. S. Judge.

Appeal Bond.

Know all men by these presents that we, Barnett Levy, Eliza Levy, John Briscoe, and Henry P. Levy, are held and firmly bound unto Edmund Fitzpatrick and David Fitzpatrick, in the sum of twenty-five hundred dollars, to be paid to the said E. and D. Fitzpatrick, their executors, or administrators, to which payment well and truly to

be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this seventh day of March, 1839.

Whereas the above named Barnett Levy and Eliza Levy have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the circuit court, ninth circuit and eastern district of Louisiana.

Now, therefore, the condition of this obligation is such, that if the above named Barnett Levy and Eliza Levy shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Signed) BARNETT LEVY, [SEAL.]
(Signed) ELIZA LEVY, per BARNETT LEVY, agent. [SEAL.]
(Signed) H. P. LEVY, [SEAL.]
(Signed) JOHN BRISCOE. [SEAL.]

Endorsed—filed March 7th, 1839.
(Signed) HOIT, *Dep. Clk.*

Signed, sealed, and delivered, in presence of
(Signed) J. Q. A. HOIT, *Dep. Clk.*

Assignment of Errors.

EDMUND FITZPATRICK and DAVID FITZPATRICK,
vs.
BARNETT LEVY and ELIZA LEVY.

Ninth judicial circuit court of the United States for the eastern district of Louisiana:

Said defendants assign, as error in the said judgment, or order of seizure and sale in this cause, further and beyond the assignment of the errors set forth in and annexed to their original petition of appeal, that no presentment or demand of payment of the note or obligation sued upon was made before the commencement of this suit, at the place where the same was made payable, and that no protest or other evidence of such demand is exhibited; wherefore the said judgment being further erroneous in this should be reversed, and plaintiffs condemned to pay costs, &c.

(Signed) TENNY, DUNLAP & BRISCOE,
Attorneys for petitioners and appellants.

Endorsed—filed June 24th, 1839.
(Signed) HENNAN, *Clerk.*

Wednesday, April 10th, 1839.

The court met pursuant to adjournment.

E. & D. Fitzpatrick,
vs.
B. & E. Levy.

On motion of Stockton, Peyton, and Pierce, counsel for the plaintiffs in the above entitled case, it is ordered that the defendants, Barnett Levy and Eliza Levy, show cause in this court, on the third Monday of May next, (if any they can,) why the writ of error in this case taken shall not be set aside and dissolved for want of sufficient and good securities on the appeal bond, Henry P. Levy and John Briscoe being irresponsible and insufficient.

United States of America, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit and eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a cause which is in the said court before you, between Edmund Fitzpatrick and David Fitzpatrick, plaintiffs, and Barnett Levy and Eliza Levy, defendants, No. 404, a manifest error hath happened to the great damage of the said Barnett Levy and Eliza Levy, as by their complaint appears; and we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this third day of May, in the year [L. s.] of our Lord 1839, and the sixty-third year of the independence of the United States.

(Signed) JOHN WINTHROP, *Clerk.*

I, Duncan N. Hennen, clerk of the circuit court of the United States for the ninth circuit, eastern district of Louisiana, do hereby certify, that the foregoing eighteen pages contain a true and faithful

transcript of the record in the case of Edmund and David Fitzpatrick vs. Barnett and Eliza Levy, as fully as the same now remains on file in my office.

And at the request of B. G. Tenney, Esq., of counsel for the defendants, I further certify, that the record of this appeal or writ of error was made out by my predecessor, John Winthrop, Esq., which record contained the citation in error, and the marshal's return of service thereof; that the same was handed over to me in May, 1839, by said Winthrop; and that, in the summer of 1839, at the request of Balie Peyton, Esq., of counsel for the plaintiffs, it was delivered to said Balie Peyton, Esq. by my deputy, Allen Pierce.

Witness my hand, and the seal of the court, this 30th January, [L. S.] 1840.

DUNCAN N. HENNEN, *Clk.*

$20 66⅔.